

#### IV. MDS EXPRESSLY MUST BE EXEMPTED FROM SECTION 227 OF THE COMMUNICATIONS ACT

Pursuant to Section 227, telecommunications services will not be prohibited if they meet one of the following tests: (1) the call is not made for a commercial purpose; or (2) the call is made for a commercial purpose but it is neither invasive of the called party's privacy rights nor an unsolicited advertisement.<sup>39</sup> These same standards for exemption are proposed in the NPRM.<sup>40</sup> MDS clearly meet these tests for exemption.

There are two (2) generations of caller-activated MDS: manual and automatic. Both manual and automatic MDS were designed as alternatives to busy and unanswered personal telephone calls and are beneficial to business and residential telephone subscribers.

MDS have proven to be in the public interest. The Commission previously concluded that MDS are a necessary service and that the Bell Operating Companies ("BOCs") must be permitted to provide such services. Similarly, in 1988, Judge Greene ruled that MDS are a valuable service and granted the BOCs permission to offer these services under the Modified Final Judgment ("MFJ"). In addition to MDS, there are several similar services that involve the caller recording and sending a message of very limited duration to the called party (usually just the caller's name) that, for the same reasons set forth herein, must be

---

<sup>39</sup> 47 U.S.C. Section 227(b)(2)(B).

<sup>40</sup> NPRM at para. 9.

exempted from Section 227 and from the proposed rules promulgated thereunder.

#### A. MDS ARE SUBJECT TO THE TCPA

Under Section 227(b)(1), it is unlawful to initiate any telephone call "using any telephone dialing system or an artificial or prerecorded voice" to specific locations (e.g., emergency services, hospitals, pagers) or to a residence without the called party's prior express consent. MDS are delivered by transmitting a prerecorded voice to a residence or business without the called party's prior express consent. Thus, MDS are subject to Section 227 of the Act.

#### B. MDS MEET THE SECTION 227 CRITERIA FOR EXEMPTION

##### 1. Several generations of MDS currently are available.

There are several generations of MDS currently available in the marketplace:

Manual MDS -- The first generation of MDS is manually accessed and activated ("manual MDS"). These MDS often require the caller to dial a 1-800 telephone number (or other number), then manually enter the destination number and billing information with the telephone keypad.

Automatic MDS -- The second generation of MDS is automatically accessed and activated ("automatic MDS"). The automatic MDS service "captures" and "remembers" the destination

number and billing information. This service is accessed automatically at the time when the busy or unanswered call actually is encountered. The caller chooses to use the service simply by pushing one or several keys on the telephone keypad, by adding coins (in the case of public telephones) or, where "voice response" technology is available, by speaking the word "yes" or "OK."<sup>41</sup>

2. MDS do not interfere with interstate commerce.

It is evident from the TCPA's legislative history quoted above, and from the description in the proceeding section, that MDS were designed as a means of completing personal

---

<sup>41</sup> There is another type of message delivery that is more specifically a voice mail application. The caller pre-programs a voice mailbox with a distribution list of numerous telephone numbers (e.g., all the telephone numbers of a boy scout troop or of a small business crime watch). The caller then has the option to use the voice mailbox for recording a message. The caller can have this prerecorded message delivered to all the telephone numbers on the distribution list. Unlike the other messaging services described herein, this service is not an instant alternative to a busy or unanswered telephone call. Rather, it is a pre-programmed service intended as a convenience -- because the caller has the ability to contact numerous destinations with a single telephone call and message. Admittedly, this service is more similar to the autodialers and prerecorded messages used by telemarketers, even though the dialing device is not actually an autodialer because it does not have a random or sequential number generator. However, users of this application generally receive permission from the persons included on the distribution list (e.g., the boy scout troop or the crime watch). Such services generally are non-commercial in nature or are used in relation to a tax exempt, nonprofit organization. Moreover, Congress intends that such calls be exempt from Section 227. See Cong. Rec. at H11311. Consequently, the Commission should conclude that the proposed exemptions, along with MessagePhone's proposed definition of autodialer and additional rule, adequately exempt message delivery services that allow the caller simultaneously to deliver personal messages to more than one person.

communications. The vast majority of consumers who choose to use MDS will do so for personal purposes and not for commercial solicitations. On those instances when MDS are used for commercial purposes, the service responds to a specific telephone call that was busy or unanswered. For example, with MessagePhone's automatic MDS, in response to the unanswered or uncompleted call, the caller does not even return the telephone on-hook. Instead the caller simply pushes a key on the telephone keypad and records a message.

Because the message is recorded and delivered in response to an attempted personal communication, the subsequent message delivery attempts do not seize more than one business telephone line at a time. Generally, MDS will attempt to deliver the single prerecorded message once every fifteen (15) to thirty (30) minutes.

Therefore, instead of the random solicitation prohibited by Section 227, commercial MDS are specific to the particular called party (e.g., "We called to tell you that your merchandise has arrived but your telephone line was busy. Please call and confirm the address for delivery.").<sup>42</sup>

3. MDS will not adversely affect telephone subscribers' privacy rights.

The telecommunications infrastructure was developed primarily to facilitate personal, private communications. In the

---

<sup>42</sup> Congress intended that such calls be exempt from Section 227. Cong. Rec. at H11312.

past, this goal has been frustrated by busy and unanswered telephone calls.

MDS have been designed to solve this problem. To conclude that sending a single personal message to a family member or business associate infringes upon telephone subscribers' privacy rights is tantamount to concluding that all telecommunications infringes upon privacy rights and should be abolished.

MDS are offered as an alternative to private communications that have been prevented from being completed. In essence, prohibiting MDS, because of abusive random, prerecorded solicitations, would be the same as prohibiting first class mail to relatives because of the public's annoyance at receiving third class, bulk mail advertisements addressed only to "resident." Obviously the two classes of service are disparate and deserve to be treated as such.

Actually, the opportunity to have messages delivered and received by MDS is perceived, not as a nuisance, but as a public service. MDS can be used every time a caller encounters a busy or unanswered personal telephone call. Quite often, the content of these messages, though not necessarily "emergency information," is considered important to both the caller and the called party (e.g., a spouse has to take another flight from the airport or a child has missed the school bus and needs a ride

home from school).<sup>43</sup>

On the other hand, the automatic, prerecorded messages used by telemarketers are random and the messages are generic and impersonal. There are occasions when autodialers indiscriminately will dial every room in a hospital, every telephone line of a business or every number for an emergency care facility. With some of these autodialers, the line continues to be seized after the caller terminates the call. It is no wonder that these random solicitations are considered dangerous as well as a nuisance. Callers using MDS can not make such random telephone calls.

4. MDS are not used for the transmission of unsolicited advertisements.

MDS, especially automatic MDS, are designed to be used on personal calls at the very point in time that the caller encounters a busy signal or determines the called party will not be able to answer the telephone. The message that the caller records generally is a brief summary of the intended original telephone call or is a request to have the called party return the call at his or her convenience. As previously stated, this

---

<sup>43</sup> In response to Bell Canada's technical trial of coin MDS, a Canadian citizen stated:

I'm writing to give you a pat on the back. I think that this idea is almost as significant as the invention of the telephone itself. For parents and business people, there are no more excuses for people on the road. Kids have no excuses for parents not knowing because the phone was busy.

See also Congressman Markey's comments during the floor debate on the TCPA. Cong. Rec. at H11310.

message simply is a delayed transmission of the original telephone call.

It is evident that MDS are not designed to be practical for mass marketing campaigns. They allow the caller to leave a message for only one person at a time, and only after the caller personally has encountered a busy or unanswered call.

Compared with the autodialers currently used for telemarketing, MDS are not cost effective for mass marketing. Even if a telemarketing business could subscribe to MDS at an extremely low monthly cost, the original telephone call would have to be made by a live person. It is more cost effective and more productive for telemarketers simply to call another potential customer than to use 30 - 60 seconds and leave a message to solicit business by asking the consumer to return the call.

Under these circumstances, there is minimal chance, at best, that MDS would be used to make the kind of random, unsolicited calls prohibited under Section 227. Indeed, the benefits of MDS clearly outweigh the remote possibility that such calls could be placed.

Moreover, the Section 227 prohibitions against unwanted telephone solicitations will assure that, in the future, MDS will not be used for such purposes and thus will not be abused by telemarketing firms. With such regulatory safeguards in place, MDS will continue to be a helpful service to telecommunications consumers.

5. MDS are not the class of calls Congress intended to prohibit.

Congress passed the TCPA to eliminate three specific problems: (1) invasion of telephone subscribers' privacy, (2) disruption of emergency telephone calls, and (3) interference with interstate commerce. MDS do not cause any of these problems.

When a MDS call is delivered, the called party's privacy rights are no more abused than they are with the reception of a normal, personal telephone call. MDS are little more than an extension of basic telecommunications services. As shown in Sections IV.B.1-4, supra, MDS are not used in a random manner and are not used to deliver messages to telephones used by medical and other emergency personnel. Finally, MDS facilitate, rather than disrupt interstate commerce. MDS are only used to complete busy and unanswered personal telephone calls and would be unnecessary if the business called has a live or automated messaging service. The caller, instead of wasting time attempting to complete the original call, has the option to leave a short, concise message for subsequent delivery. The called party, based on the content of the received message, can decide if subsequent communication is warranted.

C. THE COMMISSION'S PROPOSED RULES MUST BE REVISED TO EXEMPT MDS

Contrary to Congress' directive, the Commission's rules proposed in the NPRM do not exempt MDS and other similar non-



autodialer message delivery technologies. Accordingly, MessagePhone proposes that the rules be amended as follows:<sup>44</sup>

First, a new section 64.1100(e) must be added to include a precise definition for an "automatic telephone dialing system" or autodialer:

(e) automatic telephone dialing system - equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator to dial such numbers.

Second, proposed Section 64.1100(c) should be amended so that MDS expressly are exempt from the rules:

The term "telephone call" in sec. 64.1100(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made with an automatic telephone dialing system;

(2) that is not made for a commercial purpose;

(3) to any person with whom the caller has had a prior or current business relationship at the time the call is made; or

(4) by a tax exempt nonprofit organization.

MessagePhone's proposed rules limit the definition of "automatic telephone dialing system" to a device capable of making random, unsolicited telephone calls. Including a definition of "autodialers" in the proposed rules will assist by alleviating some of the confusion present in the Commission's NPRM. Moreover, by expressly excluding calls not made with autodialers from the class of calls prohibited under Section 227,

---

<sup>44</sup> MessagePhone's proposed revisions are underscored.

these proposed revisions set forth above guarantee that MDS are exempt, as Congress intends.

D. THE COMMISSION PREVIOUSLY HAS CONCLUDED THAT PROVISION OF MDS IS IN THE PUBLIC INTEREST

In the Notice of Proposed Rulemaking and Order in its Computer III Remand Proceedings, the Commission concluded that BOCs had to refrain from filing new Comparably Efficient Interconnection ("CEI") plans, withdraw pending CEI plans, and stop any planning of future integrated enhanced services. Despite this prohibition, the Commission recognized that BOCs could receive a waiver from these Computer II restrictions on providing new services, if, and only if, the service was able to pass a rigorous "public interest test":

Of course, we understand that we cannot foreclose entirely the possibility that a BOC may justify a waiver of the Computer II requirements of structural separation on the basis of a public interest showing. ... We note, however, that any application for such a waiver faces a "high hurdle even at the starting gate," and that a petitioner "must plead with particularity the facts and circumstances which warrant such action."<sup>45</sup>

In response to Bell Atlantic's petition to waive the Computer II rules for the offering of Coin MDS ("CMDS"), the public interest benefits of MDS were recognized by the Commission. After affirming that CMDS fulfilled the rigorous public interest requirements described above, the Commission

---

<sup>45</sup> Notice of Proposed Rulemaking and Order, CC Docket No. 90-623 (released Dec. 15, 1990) at note 135.

waived its Computer II rules to permit BOC-provision of CMDS on an integrated basis:

We conclude that Bell Atlantic has made the necessary showing for a waiver of the Computer II rules for the provision of CMDS. Bell Atlantic has demonstrated that CMDS provides an important service to customers, and that no other enhanced service provider currently offers CMDS or a similar service for pay telephones. In light of the large number of uncompleted pay telephone calls, we conclude that the record demonstrates that CMDS would be valuable to consumers.<sup>46</sup>

In its petition, Bell Atlantic noted that annually there are over 300,000,000 busy and unanswered calls from the public telephones in its region. Likewise, in a similar proceeding, BellSouth stated that there are over 750,000,000 busy and unanswered calls annually from their public telephones. The record accumulated in the Bell Atlantic proceeding also provided additional evidence of MDS' public value. This evidence amply demonstrated to the Commission that CMDS fulfill its rigorous public interest standards.

#### E. JUDGE GREENE PERMITTED BOCS TO PROVIDE MDS UNDER THE MFJ

In 1988, Judge Greene, under the MFJ, authorized all BOCs to offer MDS-type services (the BOCs also were allowed to offer electronic mail and voice storage and retrieval services at this time):

The term "voice messaging" encompasses a wide assortment of caller-directed, transient storage,

---

<sup>46</sup> Bell Atlantic Order, 6 FCC Rcd at 3400, 3401 (Common Car. Bur. 1991)(footnotes omitted).

limited-duration exchange telecommunications services. The technology allows a caller, in response to a busy signal or no answer, to record a brief message and then provide the calling instrument, the originating PBX, or the local exchange central office with routing instructions and a limited duration during which the system will attempt to complete the call and let the called party accept the recorded message at his discretion ... [MDS are] strictly caller-directed, purely unidirectional and could be activated with as little effort as pressing a single key on the keypad, [and there is] little to differentiate [MDS] from a standard telephone call other than by the incorporation of a short time delay for message delivery.<sup>47</sup>

The similarity of MDS to a standard telephone call is one of its unique aspects. In making this comparison, the court recognized that a BOC offering of MDS poses no real threat to competitors or to emerging new markets. By granting the BOCs permission to offer these services, the court also acknowledged the public value of MDS.

**F. OTHER NEW AND EMERGING TELECOMMUNICATIONS SERVICES THAT REQUIRE THE DELIVERY OF SHORT MESSAGES ALSO SHOULD BE EXEMPTED**

Presently, there are myriad new services offered by local exchange carriers, and other telecommunications service providers, that require the caller to record a very short message (e.g., the caller's name) for delivery to the called party. The Commission also should consider whether these services are subject to Section 227 restrictions. If the Commission adopts MessagePhone's proposed language for exempting all prerecorded

---

<sup>47</sup> U.S. v. Western Elec. Co., Inc., 714 F.Supp. 1, 20 n.80 (D.D.C. 1988), modified, 900 F.2d 283 (D.C.Cir. 1990) (emphasis added).

messages that are not delivered with autodialers, then the following services also appropriately will be exempt from Section 227.

With an automated collect call, instead of being told the name of the caller by a live operator, in the context of being asked whether to accept the call, one such service involves the called party actually hearing a short recording of the caller's name in the caller's own voice. Telephone companies also have begun to offer a service named "automatic call back" as an alternative to busy telephone calls. When callers elect to use this service, they record their name. When the called party hangs up, the network equipment calls them, plays the name for them, and gives them the option to hold while the system calls the original caller.

Technology now allows telephone companies to offer collect MDS. With collect MDS, in the case of a busy or unanswered telephone call, the caller records his or her name and then records a message. When the telephone line is no longer busy, the called party is dialed, the system plays the recording of the caller's name and a prompt asks the called party if they will accept the collect message by agreeing to pay for the service. The called party then has the option to accept the message and the billing responsibility or to hang-up on the call.

All these new services require that a message of extremely limited duration be sent to the called party. Like the MDS described herein, these services do not infringe upon the privacy rights of telephone subscribers, do not pose any risk to

emergency services, and do not hinder interstate commerce. In general, the messages used in these services are commercial in nature, because they ask the called party if he or she is willing to assume payment responsibilities for the telephone call. However, these short messages do not infringe upon privacy rights any more than current collect telephone calls. Likewise, these services do not use autodialers to deliver prerecorded messages. Finally, there is no way that a simple recording of a caller's name can be construed as an unsolicited advertisement.

In fact, these short, prerecorded messages actually are beneficial to public. None of these services should be subject to the restrictions of Section 227 of the Act. Instead, in view of the public interest benefits they provide, such services must be specifically addressed by the Commission's rules and exempted by adoption of the rules proposed herein.

#### G. FAILURE TO EXEMPT MDS WOULD BE ARBITRARY AND CAPRICIOUS

Congress wants MDS to be exempt from Section 227 of the Act. Several members of Congress, most notably Congressmen Markey, Rinaldo, and Bryant, singled out MDS as a technology that must not be prohibited.

In fulfilling its statutory mandate to promulgate rules implementing the TCPA, the Commission cannot act in a vacuum. Rather, it is obligated to carry out Congress' intent. Failure to exempt MDS from Section 227 of the Act would conflict with Congress and thus would be arbitrary and capricious.

Under the Administrative Procedure Act ("APA"), agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" can be set aside by the courts.<sup>48</sup> If an agency, like the Commission, "does not reasonably accommodate the policies of a statute" or if it "reaches a decision that is 'not one that Congress would have sanctioned,'... a reviewing court must intervene to enforce the policy decisions made by Congress."<sup>49</sup>

The Supreme Court detailed the analytical framework for determining if an agency governed by the APA properly construed a statute when promulgating regulations thereunder:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>50</sup>

---

<sup>48</sup> 5 U.S.C Section 706(2)(A) (1992).

<sup>49</sup> Natural Res. Defense Council v. Herrington, 768 F.2d 1355, 1383 (D.C.Cir. 1985) (citations omitted). See also United States v. Shimer, 367 U.S. 374, 382-83 (1961); Environmental Defense Fund v. E.P.A., 852 F.2d 1316, 1326 (D.C. Cir. 1988), cert. den., 489 U.S. 1011 (1989); ITT World Communications, Inc. v. F.C.C., 725 F.2d 732, 741 (D.C. Cir. 1984).

<sup>50</sup> Chevron U.S.A., Inc. v. Natural Resources Defense, 467 U.S. 843, 104 S.Ct. 2778, 2781-82 (citations and footnotes omitted), reh. den. 468 U.S. 1227.

Once Congress' intent is identified, the appropriate response is fixed. If the court ascertains that "Congress had an intention on the precise question at issue, that intention is the law and must be given effect."<sup>51</sup>

To ascertain congressional intent, courts will review statutory language and legislative history.<sup>52</sup> With respect to the TCPA, these factors compel the Commission to exempt MDS from Section 227. The nature of MDS and how they are provided are consistent with the plain language of the TCPA statutory exemptions because they are not commercial in nature and are not used for solicitation purposes. Moreover, Congress intended that MDS must be exempted from Section 227 of the Act, as Congressman Bryant, with the agreement of his fellow members of Congress, declared:

[MDS do] not consist of random calls with prerecorded messages that invade the privacy of our constituents. Rather, they provide a message service that clearly is beneficial to the public. It is important that existing and emerging technologies and services that are beneficial to the public should not be prohibited by this legislation.<sup>53</sup>

Unless the Commission eliminates the uncertainty regarding MDS in the rules proposed in the NPRM, its interpretation of the TCPA would be "inconsistent with obvious congressional intent" and thus reversible as an arbitrary and capricious act.<sup>54</sup>

<sup>51</sup> Chevron U.S.A., 104 S.Ct. at 2782 n.9.

<sup>52</sup> Solte Corp. v. U.S. E.P.A., 952 F.2d. 473, 479 (D.C. Cir. 1991); ITT World Communications, 725 F.2d at 742 n.24.

<sup>53</sup> Cong. Rec. at H11311-11312 (emphasis added).

<sup>54</sup> ITT World Communications, 725 F.2d at 741.



Consequently, the Commission must fulfill its statutory mandate under the TCPA and revise its rules so MDS and other similar beneficial messaging services expressly are exempt from Section 227 so that they remain available to the public.

#### V. THE PROPOSED TECHNICAL AND PROCEDURAL STANDARDS MUST ACCOUNT FOR DIFFERENCES BETWEEN AUTODIALED TELEMARKETING MESSAGES AND MDS

The Commission proposes Technical and Procedural Standards for "artificial or prerecorded voice systems."<sup>55</sup> Unlike the proposals in the NPRM discussed above, these proposed rules apparently apply to systems that use autodialers as well as to those that do not.

##### A. THE SCOPE OF THE PROPOSED STANDARDS MUST BE CLARIFIED

In Section 227(d)(1)(A), the standards are made applicable to "telephone call[s] using any automatic telephone dialing system," otherwise referred to as an autodialer.<sup>56</sup> To confuse matters, the Commission's proposed rule implementing these standards, Section 64.1100(d), introduces an undefined technology called "automatic dialing devices." Thus, it is unclear if "automatic dialing devices" are the same as automatic telephone dialing systems (autodialers). Accordingly, as an initial matter, the Commission must clarify which messaging services are covered

<sup>55</sup> NPRM at para. 21.

<sup>56</sup> 47 U.S.C. Section 227(d)(1)(A) (1992) (emphasis added).

by the proposed technical and procedural standards.

**B. ARTIFICIAL OR PRERECORDED TELEPHONE MESSAGES, DELIVERED BY MEANS OTHER THAN AN AUTODIALER, SHOULD BE IDENTIFIED ONLY BY THE CALLER'S NAME**

MessagePhone recommends that, regardless of the purpose of the prerecorded communication or the equipment utilized to deliver the communication, the message should begin with the caller's name. In the case of personal messages sent with MDS, especially communications from friends or family members, that are recorded in response to uncompleted or unanswered telephone calls, it is unnecessary to preface the recorded message with the caller's location or telephone number. Accordingly, MessagePhone recommends that the Commission adopt the following revision to proposed Section 64.1100(d):<sup>57</sup>

all artificial or prerecorded telephone messages shall:

(1) at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) in the case of messages being delivered with an automatic telephone dialing system, shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual.

Unlike marketing messages, the caller's name provides the called party with sufficient information to decide whether to listen to the message. In fact, a called party, who is anxiously waiting to hear a message from a family member (who might even

---

<sup>57</sup> MessagePhone's proposed revision is underscored.

live at the same address as the called party), would consider the announcement of the telephone number and address to be a nuisance.

Requiring disclosure of the caller's address or location is unnecessary for applications of MDS. For example, MDS also are offered from pay telephones. In most cases, the technology requires callers to record their name before allowing them to record their message. Likewise, when the message is delivered, the recording of the name is played first, thus giving the called party the opportunity to hang-up if they do not want to hear a message from that person.

The proposed rules for technical standards, if they actually are for all prerecorded messages, regardless of whether an autodialer is used for delivery, would require the pay telephone user to preface the voice message with a street address and a telephone number. If this is the case, it is unclear whether the caller must use the pay telephone number, office telephone number or home number.

Whereas this requirement makes sense for telemarketing messages, it is not necessary for messages that are recorded as an alternative to a busy or unanswered personal telephone call. If the caller desires a return telephone call, they will record the appropriate telephone number. However, if the caller is known by the called party (as in the case of a friend, business associate, or family member), then it is unnecessary to leave a telephone number.

The Commission must clarify the language for the proposed

Section 64.1100(d) by stating that the caller name and address disclosure requirement applies only to prerecorded messages delivered by "automatic telephone dialing systems." In addition, the Commission should consider requiring: (1) that all MDS adopt the standard of requiring the caller to record his or her name before recording a message and (2) that the technology play the recording of the name to the called party before playing the recorded personal message. In this manner, the called party is assured of knowing who is sending the message before actually listening to it.

## VI. CONCLUSION

As demonstrated herein, the following underscored revisions to the Commission's proposed rules are consistent with the intent of Congress when it passed the TCPA and must be adopted:

First, a new Section 64.1100(e) must be added to include a precise definition for an "automatic telephone dialing system" or autodialer:

(e) automatic telephone dialing system - equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator to dial such numbers.

Second, proposed Section 64.1100(c) should be amended so that MDS expressly are exempt from the rules:

The term "telephone call" in sec. 64.1100(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made with an automatic telephone dialing system;

(2) that is not made for a commercial purpose;

(3) to any person with whom the caller has had a prior or current business relationship at the time the call is made; or

(4) by a tax exempt nonprofit organization.

Third, proposed Section 64.1100(d) should be amended to clarify and narrow the scopes of the technical and procedural standards:

all artificial or prerecorded telephone messages shall:

(1) at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) all messages being delivered with an automatic telephone dialing system shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual.

Telecommunications carriers and service providers currently are making decisions as to whether they should implement MDS. It is important, both to the future of these publicly beneficial services and to companies like MessagePhone, that the Commission act in a timely manner to differentiate MDS from the random, prerecorded solicitations of telemarketers. Moreover, Congress, the Commission, and the MFJ court agree that the very MDS that would be protected by the proposed rules, as revised, serve the

public interest. Accordingly, the Commission should promptly exempt MDS from Section 227 prohibitions by adopting the rules proposed in the NPRM, as revised herein.

Respectfully Submitted,

MESSAGEPHONE, INC.

BY:

  
Douglas E. Neel

Vice President, Regulatory Affairs  
MessagePhone, Inc.

5910 N. Central Expressway

Dallas, Texas 75206

(214)987-8130

May 21, 1992

Certificate of Service

I, Janice LeRoy, administrative assistant for MessagePhone, Inc. hereby certify that I have on this twenty-first day of May, 1992, sent copies of the foregoing Comments by first-class United States Mail, postage prepaid, to the following:

Olga Madruga-Forti  
Attorney - Domestics Filing Branch  
Federal Communications Commission  
Room 6008  
2025 M. Street  
Washington, D.C. 20554

Downtown Copy Center\*  
1114 21st Street, N.W.  
Washington, D.C. 20037

  
\_\_\_\_\_  
Janice LeRoy

\* Two Copies Provided